United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7234

To be argued by
MICHAEL P. FOGARTY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BARBARA BOYD, et al., on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

-against-

THE JUSTICES OF SPECIAL TERM PART I, OF THE SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, individually and in their official capacities, et al.,

Defendants-Appellees.

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BRIEF FOR DEFENDANTS-APPELLEES

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Statement of Facts

In July and August, 1975, 61 indigent persons seeking to institute divorce proceedings applied to the Supreme Court, Bronx County, for assignment of counsel pursuant to CPLR 1102(a). Their applications were consolidated and, despite a finding that "the assistance of counsel is necessary" for each of them, their requests for appointed counsel were refused. Matter of Boyd, N.Y.L.J. Nov. 6, 1975, p. 10, col. 2 (October 31, 1975) (Cotton, J.).

Justice Cotton's refusal to appoint counsel was based on his finding that "in the absence of public compensation for the assistance of attorneys...the resources of Legal Aid services and the private Bar are presently inadequate to deal with the problem." Significantly, this finding is unsupported by a recitation of any actual efforts by Justice Cotton to encourage Legal Aid to hire paraprofessionals to assist pro se plaintiffs, or to assign private counsel to these plaintiffs.

His decision was also presumably based on his belief that the Boyd plaintiffs had no constitutionally guaranteed right to counsel:

> In conclusion, it may be noted that these petitioners have not urged upon this Court the argument that they are entitled to assigned counsel as a matter of constitutional right. Had they done so, the Court would have been constrained to reject that argument, under the majority holding of Matter of Smiley, supra.

While defendants contend that Justice Cotton's refusal to recognize any constitutional right of the Boyd plaintiffs to counsel was correct, they believe that the ultimate decision in that case was incorrect.

They contend that, on the facts before Justice Cotton, it was impossible to determine whether all the Boyd plaintiffs needed the assistance of counsel, that, even if all of the plaintiffs were in need of counsel, the resources of Legal Aid and the private Bar were more than adequate to meet this need, and that Justice Cotton's refusal to assign the Boyd plaintiffs counsel, despite his finding that they were in need of counsel, was an abuse of his discretion under CPLR 1102(a).

Defendants, in substance, contend that relief for the 61 Boyd plaintiffs was clearly available from the Appellate Division, First Department, which had jurisdiction to review the above findings of fact and conclusions of law, as well as Justice Cotton's observation concerning the failure of the Constitution to guarantee these plaintiffs counsel.

No appeal was taken from that decision, however, nor was any attempt made by way of Article 78 proceeding to challenge Justice Cotton's refusal.

Instead, ten of the Boyd plaintiffs,* along with three other persons, two of whom never even applied for assignment of counsel pursuant to CPLR 1102(a)** and one of whom applied for assigned counsel for defense of a divorce action*** but was denied such relief,**** instituted this

* Plaintiffs Barbara Boyd, Noemi Torres, Carmen Vigo, Helen Johnson, Carmen Casteneda, Awilda Cedeno, Rosa Agosto, Mariam Johnson, Francisco Seda and Gloria Simons.

** Plaintiffs Stella Palmer and Valeria Harding. It is defendants' contention that these plaintiffs are improperly before this Court, even if the complaint is otherwise sufficient, in that, absent allegations that they sought, and were denied counsel pursuant to CPLR 1102(a), they cannot claim that New York, by operation of that statute, has denied them their right to counsel.

*** Plaintiff Carlota Barrera.

**** Barrera v. Barrera, Supreme Court, Bronx County, August 6, 1975 (copy of decision annexed to plaintiffs' complaint as Exhibit "B").

It is defendants' contention that plaintiff Barrera is also improperly before this Court, even if the complaint is otherwise sufficient, as she had the right, under Domestic Relations Law § 237, to move for an order requiring her husband, plaintiff in a divorce action against her and represented by private counsel, to pay for her counsel fees. Plaintiff Barrera makes no allegations that she sought such an order, and without a showing that she has sought and been denied relief pursuant to DRL § 237, she cannot claim that she, like the first ten named plaintiffs herein, is "unable to obtain counsel," nor may she claim that New York, by CPLR 1102(a) or any other statute, has denied her her right to counsel.

action. Relying solely on Matter of Boyd,* the decision of a single Supreme Court Justice in a single case, which, while clearly incorrect, was never appealed, they seek a declaration of the unconstitutionality of CPLR 1102(a), on the ground that that statute, as applied to them and to unnamed other indigent divorce plaintiffs and defendants, has denied them their constitutional right to appointed counsel in divorce proceedings. The Court below (Duffy, J.) dismissed the complaint.

POINT I

RELIEF WAS AVAILABLE THROUGH THE STATE APPELLATE COURTS.

I. As Matter of Boyd was incorrect under New York law, it would have been reversed on apeal.

Defendants contend that Justice Cotton erred in both his findings of fact and conclusions of law in Matter of Boyd.

Their first objection is to Justice Cotton's finding that all 61 plaintiffs were in need of counsel.

It is impossible to determine from the form affidavits before the court in Boyd either the complexity of

* To the extent that plaintiffs rely on the decision in Barrera, supra, such reliance is also misplaced in that Mrs. Barrera had a right to payment of counsel by her husband under DR1 § 237. See fourth footnote on page 10, supra.

the litigation contemplated by each plaintiff, or each plaintiff's level of education and actual ability to comprehend the legal procedures he or she must follow. While they each may have been in need of some form of assistance, defendants believe that a full examination of the circumstances and abilities of each Boyd plaintiff may well show that some plaintiffs could have prepared and litigated uncontested matrimonial proceedings with only the help of paraprofessionals or court personnel.

The availability and extent of such help is also a question of fact. The affirmation of Michael D. Hampden, Attorney-in-Charge of the Legal Aid Society, Bronx Office, was accepted by Justice Cotton as "an unequivocal statement of inability to accept these cases." However, the Justice failed to inquire as to whether the Legal Aid Society might

more efficiently utilize its available resources by hiring paraprofessionals able to assist pro se indigent matrimonial plaintiffs. Without such an inquiry, defendants believe that Justice Cotton's finding that all the plaintiffs were in need of counsel, and that the resources of Legal Aid were inadequate cannot be sustained.

Likewise, Justice Cotton failed to even attempt to assign private counsel to these plaintiffs. Had he made such an attempt, through the auspices of the Bronx County Bar Association, defendants contend that he would have found the resources of the private Bar more than adequate to meet the needs of the Boyd plaintiffs.

The Bronx County Bar Association has between 1400 and 1500 members, according to Mrs. Esther Kerrigan, its Secretary. Under EC 2-25 and 2-29 (supra at 5-6), any of these persons assigned to represent a Boyd plaintiff would have been obligated to accept such an assignment, absent a showing of either "compelling reasons" (EC 2-29) or "previously arranged professional commitments.* People v.

* Such assignments need not have been limited to attorneys specializing in matrimonial litigation. The issues presented by most of the Boyd plaintiffs were simple ones, many of their actions will probably be uncontested, and few assets are involved. It is therefore contended that, with the aid of the "Concise Handbook of Matrimonial Practice," available through Brooklyn Legal Services Corporation B, and other matrimonial texts, any practicing attorney could adequately represent a Boyd plaintiff.

Thompson. 205 App. Div. 581, 582 (2d Dept. 1923).

Therefore, insofar as Justice Cotton's refusal to assign the Boyd plaintiffs counsel was premised on a finding that he could not have located attorneys willing to accept these assignments, a finding not tested by any efforts to assign these cases to members of the Bronx Bar, this decision was clearly incorrect.

Lastly, defendants believe that Justice Cotton's interpretation of CPLR 1102(a) was incorrect, that under Smiley and other case law, Justice Cotton, upon finding that counsel was necessary for each plaintiff, was obligated to assign each of them counsel, despite the burden such assignments might have placed on the Bronx Bar, and his refusal to do so was an abuse of discretion.

In Smiley, the Court of Appeals, while acknowledging the hardship uncompensated assignments place on attorneys, nonetheless referred to such assignments as a means by which indigent matrimonial litigants may obtain counsel. By clear implication, therefore, judges must continue to assign counsel to indigent matrimonial plaintiffs in need of counsel, and attorneys so appointed are obligated to accept these assignments. If an attorney performing uncompensated services pursuant to appointment under CPLR 1102(a) wishes to challenge the constitutionality of his assignment, he may of course do so, after having performed the uncompensated services. His rights, however, may not be considered by a judge who is obligated, under CPLR 1102(a), to appoint counsel to all needy indigent litigants.

That appointments must be made to indigent plaintiffs in need of counsel can be seen by those cases which have held that the refusal to appoint counsel to an indigent litigant in need of counsel is an abuse of discretion. Emerson v. Emerson, 33 A D 2d 1022 (2d Dept. 1970); Brounsky v. Brounsky, 33 A D 2d 1028 (2d Dept. 1970).

It has also been made clear by the cases which have held that, if an indigent litigant is in need of counsel, the court must assign him counsel, and the attorney so assigned must accept this assignment, despite the fact that he may not be compensated for his services. See People ex rel. Whedon v. Board of Supervisors, 192 App. Div. 705, 706 (3d Dept. 1920), and People ex rel. Hadley v. Supervisors of Albany County, 28 How. Prac. 22, 26-7, cited in Smiley for their holding that such uncompensated assignments do not violate the constitutional rights of lawyers. See also People v. Witenski, 15 N Y 2d 392, 397-8 (1965); Cerami v. Cerami, 44 A D 2d 890 (4th Dept. 1974); Jacox v. Jacox, 43 A D 2d 716 (2d Dept. 1973); Emerson, Brounsky and Thompson, supra;

People ex rel. Acritelli v. Grout, 87 App. Div. 193, 196, (1st Dept. 1903), aff'd on prevailing opinion below, 177 N.Y. 587 (1904); Kaminski v. Kaminski, 81 Misc 2d 725 (Sup. Ct. Kings Co. 1975); Bartlett v. Kitchin, 76 Misc 2d 1087, 1090 (Sup. Ct. St. Lawrence Co. 1973); Soto v. Soto, (Sup. Ct. N.Y. Co. 1972) (unreported decision, a copy of which is annexed hereto as Exhibit "A"); People v. Marx, 10 Misc 2d 1053, 1056-7 (Queens Co. Ct. 1957).

It should also be noted that defendants are aware of no federal case establishing a right of court-appointed attorneys to compensation. Further, even in the cases establishing the right to counsel in other proceedings, no requirement that the state compensate attorneys so appointed was made. See, Gagnon v. Scarpelli, 411 U.S. 778 (1973), Argersinger v. Hamlin, 407 U.S. 25 (1972), In re Gault, 387 U.S. 1 (1967), Gideon v. Wainwright, 372 U.S. 335 (1963).

The only New York case holding that uncompensated assignments violate attorneys' constitutional rights is Menin v. Menin, 79 Misc 2d 285 (Sup. Ct. Westch. Co. 1974). This case was summarily affirmed by the Second Department "on authority of" Smiley, 48 A D 2d 904 (1975).

What the court in Smiley said on this issue, however, is the following:

> As exemplified in some areas in the State, the undue burden which may be placed on the private Bar by assignments under CPLR 1102, may also become intolerable and some might say rank as a violation of the constitutional rights of lawyers (compare Menin v. Menin, 79 Misc 2d 285; Bedford v. Salt Lake County, 22 Utah 2d 12, 14-15 with People ex rel. Whedon v. Board of Supervisors, 192 App. Div. 705, 706; People ex rel. Hadley v. Supervisors of Albany County, 28 How Prac 22, 26-27, cited with approval in People ex rel. Ranson v. Board of of Supervisors of Niagara County, 78 N.Y. 622; State v. Rush, 46 N.J. 399, 407-409). (36 N Y 2d at 441.)

Defendants contend that this statement does not constitute a finding that attorneys' Fourteenth Amendment rights are violated by uncompensated assignments. They therefore argue that Smiley did not authorize the Second Department's affirmance of Menin, and this decision, insofar as it may be read to overrule Whedon and Hadley, is incorrect.

Defendants therefore contend that Justice Cotton could not have refused to appoint counsel for the Boyd plaintiffs out of deference to as yet unrecognized constitutional rights of the private Bar. Under CPLR 1102(a), he was obligated to assign counsel to all the Boyd plaintiffs in need of counsel, the resources of the Bronx Bar were

adequate to provide attorneys for such assignments, and his refusal to make these assignments was an abuse of his discretion under CPLR 1102(a).

For these reasons, Matter of Boyd would clearly have been reversed on appeal; without doubt, the Appellate Division, First Department would have ordered Justice Cotton to assign counsel to all the Boyd plaintiffs in need of counsel.

2. The state appellate court had jurisdiction over the constitutional claims raised herein.

As was noted above, Justice Cotton specifically found that the Boyd plaintiffs had no constitutional right to counsel.

The First Department therefore had jurisdiction, both under the Supremacy Clause, and by virtue of this finding, to consider the constitutionality of CPLR 1102(a) as applied to the plaintiffs in Boyd. Plaintiffs therefore could have raised, in that forum, the claims they make herein, and this action is barred by the doctrine of res judicata. See Point B(2), infra at 27-41.

A. PLAINTIFFS HAVE FAILED TO PRESENT A CLAIM UPON WHICH RELIEF CAN BE GRANTED OR OVER WHICH THIS COURT HAS JURISDICTION.

Plaintiffs herein frame their complaint in terms of a constitutional challenge, under the Civil Rights Act, 42 U.S.C. § 1983, et seq., to CPLR 1102(a) as applied to "all indigent persons who are or will be plaintiffs or defendants in divorce actions brought in the Supreme Court of the State of New York, Bronx County, and who are unable to obtain counsel." Complaint ¶s 3 and 9.

This statute was applied to plaintiffs, however, by the judicial decision of a single state Supreme Court justice in a single action, and the application -- as well as the mis-application -- of a statute by a state court judge, acting in his judicial capacity, is not "state action" for purposes of the Civil Rights Acts. Remedy for a state judge's alleged error, including his alleged failure to declare a state statute violative of the Fourteenth Amendment, lies solely through the state appellate process, not through a plenary action in the federal courts.

Further, this action is barred by the doctrine of res judicata and the related Rooker doctrine.

Plaintiffs' attempts to sue on behalf of a class of persons alleged to be similarly denied their constitutional rights by action of CPLR 1102(a) do not cure those jurisdictional defects.

As will be seen in the discussion concerning class certification, [redacted] they lack standing to represent the class they define, as many persons in that class are not similarly situated to them. Further, although they allege that defendants refuse to assign counsel to this class, they have failed to allege any facts showing that Justice Cotton, or any of the defendants herein, have engaged in a pattern or

practice of declining to assign counsel to indigent divorce plaintiffs needing such counsel. Defendants believe that the absence of such allegations is significant; in light of New York case law interpreting CPLR 1102(a), they contend that there is no question that, however "burdensome" such assignments may be, New York judges are required to make them, and therefore plaintiffs are not in fact challenging a "pattern or practice" of defendants, but a single incorrect decision of a single state court judge.

However, even if CPLR 1102(a) were to authorize judges to refuse to assign counsel to indigent divorce litigants, the remedy of such litigants would be the same as that of plaintiffs herein -- a state court appeal, challenging the constitutionality of that statute as applied to them. Plaintiffs' class allegations therefore do not overcome the jurisdictional defects of this action.

POINT II

THE DECISION OF A STATE COURT JUDGE, HOWEVER ERRONEOUS, IS NOT STATE ACTION SUBJECT TO CHALLENGE UNDER THE CIVIL RIGHTS ACTS.

In Jemzura v. Belden, 281 F. Supp 200, 206 (N.D.N.Y. 1968), an unsuccessful state court litigant sued a judge and other state officials under § 1983 for an alleged conspiracy denying him due process in prior Family Court proceedings. In holding that the federal court was without jurisdiction to consider the claim, the Court stated as follows:

> There is abroad in the land a notion that the Civil Rights Act has vested in the federal courts the function of an Ombudsman-to review any grievance, no matter how petty, stemming from the aggrieved party's unsuccessful results in state court litigation. Nothing could be further from the Congressional purpose.

The reason why federal courts may not entertain Civil Rights actions based on allegedly erroneous state court decisions is explained in detail in Mendez v. Heller, 380 F. Supp. 985 (E.D.N.Y. 1974) (3-judge court), remand for appeal to Second Circuit, 420 U.S. 916 (1975).

Plaintiff in this § 1983 action sued the justice presiding in the Matrimonial Part of the Brooklyn Supreme Court, the chief court clerk and the Attorney General, seeking to challenge the constitutionality of Domestic Relations Law § 230(5), New York's 2-year residency requirement for divorce actions.

The court held that plaintiff had not presented a justiciable controversy, because she had not yet submitted her claim to these officials. It further found, however, that a Civil Rights action could not have been brought by plaintiff, even if she had unsuccessfully raised her constitutional claims before Justice Heller, because the Justice's adverse decision would be an "official " action which would not be such as to "damagingly transgress" her rights (380 F. Supp. at 992). There is a distinction between a public official "as an adversary committing the act of right-denial and the tribunal that errs in performing a judicial function" (id. at 993). The acts of the former may properly be challenged in a Civil Rights action; the acts of the latter may not.

The Court analogized to the situation in Boddie:

> Boddie is typical: the Clerk's refusal to file the plaintiffs' papers solely because they had not paid the filing fee, and the action of the judges charged with the administration of the Court in similarly declining to grant the applications to file the papers, were completed ministerial acts that as such and of themselves denied the very right which the Federal case properly vindicated in the action under

> 42 U.S.C. § 1983. The contest was between the litigants and the Clerk qua Clerk (and the administrative judges) seeking to exact a fee and barring access to the Court until it was paid. He (representing the State) was the adversary in the fee controversy that was barring the litigants. The action of the state officers was a completed denial by state action (i.e., the refusal to file because the fee "due" the Clerk had not been paid) of a constitutional right, a denial of the Ex parte Young, 1907, 209 U.S. 123, 156, 161, 28 S.Ct. 411, 52 L.Ed. 714, type, and not a simply erroneous judicial decision on a constitutional point, reviewable only by appeal. Judge Smith in Boddie in the District Court, 286 F.Supp. 968, 971, pointed this out--that the defendants were there sued for their obstructive action, taken in their administrative capacities, action quite different from the judicial function exercised in an unreported state case decided by another judge who had, after full consideration on the merits, denied an application to proceed in forma pauperis in a divorce action. (id. at 992)

It also distinguished cases involving mandamus or prohibition:

> Similarly, where the extraordinary relief of mandamus or prohibition is granted as against a judicial officer who has either refused to exercise a jurisdiction or a discretion which it is his duty to exercise or who has insisted upon exercising a jurisdiction that is not his: the judicial

> officer has made himself an adversary by the course that he has pursued in denying a clear-cut right. Almost universally in such cases the extraordinary writ supplements the procedural law and but furnishes a mode of intermediate appeal from a damagingly mistaken determination that cannot be adequately remedied by appeal at the end of the whole case. (ibid.)

Reference was also made to Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1970). In that case, plaintiffs challenged the constitutionality of procedures for admission to the New York Bar. The Court in Mendez observed that, in LSCRRC,

> ...the adversary of the law-student applicants for admission to practice was, inevitably, a committee of the Appellate Division in any dispute over the right to be admitted to the Bar. Only the Court through its committee and by its confirmatory actions could grant or withhold the right to practice, subject to judicial review. The immediate act of granting or denying the right to practice law, as deliberative action taken on the application, was a completed act of government which, if it deprived a student applicant of a constitutional right, was vindicable by federal action under 42 U.S.C. § 1983 or by appeal through the New York Courts and, ultimately, to the United States Supreme Court.

See also Schaefer v. Leone, 443 F. 2d 182, 185 (2d Cir. 1971). Although this was a habeas corpus case, the Court's observations on its jurisdiction over constitutional claims arising out of erroneous interpretations of state laws by state court judges are significant.

There was no question that the petitioner in Schaefer was convicted for a non-existent crime, on the basis of erroneous jury instructions. Nonetheless, the Court held that it had no jurisdiction over the petition:

> Upon the facts here presented, we hold that the legality of Schaefer's conviction was properly the exclusive province of the Connecticut courts. Were we to hold otherwise, the District Court's rationale would turn every disagreement by a federal district judge with a State court's interpretation of a State statute and their appraisal of a State trial court's instructions thereunder potentially into a question of "fundamental due process." This result would impose an additional burden on our already overburdened federal courts and pose an unnecessary and undesirable threat of greatly increased federal intervention in cases involving the sufficiency of jury instruction and the construction of State law.

In the instant case, plaintiffs are challenging the allegedly unconstitutional results of a decision by a state court judge. Justice Cotton's decision was made in the course of performance of his judicial functions; he was not acting "as an adversary committing the act of right - denial." Therefore plaintiffs may not seek relief through the federal courts; their sole remedy was through the state appellate process.

POINT III

THE DOCTRINE OF RES JUDICATA AND THE RELATED ROOKER DOCTRINE PRECLUDE PLAINTIFFS FROM BRINGING THIS ACTION, DESPITE THE FACT THAT A STATE APPELLATE COURT NEVER PASSED ON THEIR CONSTITUTIONAL CLAIMS.

The doctrine of res judicata and the related Rooker doctrine apply to challenges in federal court based on claims which either were raised or could have been raised in a prior state court action. The fact that plaintiffs did not in fact raise their constitutional claims in Matter of Boyd is irrelevant, as are the facts that these claims were not considered by a state appellate court, and that defendants herein were not parties to Matter of Boyd.

a. The doctrine of res judicata applies to issues which, although not raised in the state court action, could have been litigated therein.

In Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 375 (1939) the Supreme Court was asked to review a state court decision based on a statute later found to be unconstitutional. Plaintiff had not raised the issue of constitutionality in the state court proceedings. Nonetheless, the Court held that the doctrine of res judicata barred it from considering the claim.

> If the general principles governing the defense of res judicata are applicable, these [plaintiffs], having the opportunity to raise the question of invalidty, were not the less bound by the decree because they failed to raise it.

This view of the doctrine of res judicata has been expressly applied to claims under the Civil Rights Act which were not raised in prior state court proceedings.

In Taylor v. New York City Transit Authority, 433 F. 2d 665, 668 (1970) the Second Circuit was asked to decide a due process claim not raised by plaintiff in his New York Civil Service proceedings and therefore not permitted to be raised in subsequent state court proceedings. It declined to do so, applying the doctrine of res judicata:

> Had appellant prosecuted his constitutional objection in a timely manner, and had the Commission made an unsatisfactory disposition thereof, the courts of New York, in the exercise of their responsibility under the Supremacy Clause of the United States Constitution to entertain federal constitutional questions, no doubt would have taken jurisdiction of appellant's case. [Citations omitted]
>
> It is in this sense that we find that the state courts made a final determination on the "merits," which, under the principle of res judicata, we should not disturb.

Coogan v. Cincinnati Bar Association, 431 F. 2d 1209, 1211 (6th Cir. 1970) was an action under the Civil Rights Act to enjoin enforcement of a final judgment suspending plaintiff from the Bar, on grounds not raised in the state court proceeding. In applying the doctrine of res judicata, the Court held that:

> The final judgment of the Supreme Court is conclusive and Coogan is precluded by the doctrine of res judicata from relitigating not only the issues which were actually involved in the disbarment proceeding, but also the issues which he might have presented.

See also: Flynn v. State Board of Chiropractic Examiners, 418 F. 2d 668 (9th Cir. 1969), an action also attacking plaintiff's suspension on grounds not raised in the state proceedings:

> It is immaterial whether or not the constitutional issues were actually litigated in appellant's state court action, because we are here concerned with the application of that branch of the res judicata doctrine known as bar and not with the branch called collateral estoppel. "A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action." [Citations omitted]

Frazier v. East Baton Rouge Parish School Board, 363 F. 2d 861, 862 (5th Cir. 1966), an action seeking review, on grounds of discrimination not raised in state court proceedings, of plaintiff's dismissal as a teacher from a public school:

> Under the doctrine of res judicata, which the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first action. See Restatement, §§ 47, 48 (1942). Therefore, the decision of the state court of appeal, acting judicially, is a bar to Frazier's claim in the federal district court even though he raises his federal claim of discrimination for the first time in the federal court. (Emphasis in original)

The above-cited decisions make clear that the fact that plaintiffs did not raise their constitutional objections in a state appellate proceeding makes the doctrine of res judicata no less applicable in the case at bar.

Courts have not hesitated to apply the doctrine of res judicata to § 1983 claims which arise out of state court proceedings, but were not passed upon by state appellate courts, either because the plaintiff never took an appeal, or because the appellate court found itself without jurisdiction over the constitutional claim.

In Mertes v. Mertes, 350 F. Supp. 472 (D. Del. 1972) (3 judge court), affd. 411 U.S. 961 (1973), plaintiff had raised the question of the constitutionality of Delaware's provisions for disposition of property upon divorce in his state Supreme Court appeal. However, that court refused to consider the claim, becuase it had not been raised in the court below. Nonetheless, the Third Circuit applied the doctrine of res judicata, in the subsequent action under § 1983:

> "The fact that the constitutional claim raised here was not considered by the Delaware Supreme Court because of [the] procedural default in failing to raise the issue in the lower state court does not make the doctrine inapplicable." 305 F. Supp. at 474.

Plaintiff in Katz v. State of Connecticut, 433 F. 2d 878 (2nd Cir. 1970) had lost a property condemnation proceeding before a State Referee. At the trial he had raised constitutional objections, which the Referee denied, while granting an exception. Although he had a right of appeal to the state Supreme Court, he never availed himself of that right, choosing instead to bring a Civil Rights action on his constitutional claims in federal court.

The Second Circuit affirmed the decision of the district court, 307 F. Supp 480 (D.Ct. Conn. 1969), on the ground of res judicata.

See also Meyer, supra, where the court held that plaintiff's constitutional claims, arising out of the state court judge's conduct of the trial, were barred by res judicata despite the fact that no post-trial motions were filed in the state court.

Plaintiffs herein, like plaintiffs in Mertes, Katz, and Meyer, never received state appellate review of their constitutional claims concerning CPLR 1102(a). Nonetheless, this Court, like the courts in those cases, should apply the doctrine of res judicata to their claim.

b. Under the Rooker doctrine this Court is without jurisdiction to review alleged errors in state court judgments.

In situations similar to the case at bar, some courts have applied the principles of Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, (1923) in finding that they were without jurisdiction to grant the relief sought by plaintiffs -- collateral review of a state court decision.

Plaintiff in Rooker had brought an action in federal district court, seeking to have a state court judgment declared null and void on constitutional grounds. The Court held that this was not the province of the federal court:

> If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication [Citations omitted].
>
> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character [Citing statute]. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, § 24. Besides, the period within which a proceeding might be begun for the correction of errors such as are charged in the bill had expired before it was filed, [Citing statute], and as is pointed out in Voorhees v. Bank of United States, after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly.

In Tang v. Appellate Division of New York Supreme Court, First Department, 487 F. 2d 138 (1972), cert. den. 416 U.S. 906

(1974) the Second Circuit held Rooker applicable to an action under § 1983.

Tang involved a challenge to New York's six-month residency requirement for admission to the State Bar. Plaintiff had raised the same issues and lost in the Appellate Division. Instead of appealing to the New York Court of Appeals, however, he brought an action in federal court under the Civil Rights Act. The Court held that:

> The district court lacks jurisdiction to review state court determinations of federal constitutional questions and on that ground we affirm the dismissal of the action. Rooker v. Fidelity Trust Co. 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). (487 F. 2d at 141).

In applying Rooker, the Court in Tang referred to Anderson v. Lecon Properties, Inc. 457 F. 2d 929, 930 (8th Cir. 1972) cert. den. 409 U.S. 879 (1972). In that case, plaintiffs had been successful at trial of a state court action. However, they were eventually subject to a writ of mandamus issued by the Minnesota Supreme Court ordering the trial court to vacate its judgment in plaintiffs' favor.

They thereupon instituted a § 1983 action in the federal district court, alleging that the Supreme Court of Minnesota had, inter alia, violated their federal constitutional rights of due process and equal protection under the Fourteenth Amendment. In affirming the district court's dismissal of the complaint, the court stated:

> To the extent that there was any error of constitutional magnitude in the Minnesota Supreme Court's decision, plaintiffs' sole recourse was to the Supreme Court of the United States. Federal courts of inferior jurisdiction have no jurisdiction to review alleged errors in state court judgments. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); Evanson v. Northwest Holding Company, 368 F. 2d 531 (8th Cir. 1966).

See also Roy v. Jones, 484 F. 2d 96 (3rd Cir. 1973), in which the doctrine of res judicata was applied to an action brought by state justices of the peace to enjoin enforcement of suspension orders issued against them in an earlier state court proceeding. The court noted that

> "[t]here is a line of authority springing from [Rooker] which holds that a federal district court is without jurisdiction to redetermine issues already litigated in a prior state action. Apparently, the Supreme Court felt that allowing relitigation in the district courts of issues once adjudicated in the state courts would amount to a usurpation of the Supreme Court's exclusive power to review state determinations of federal questions. . . .
>
> In Daniel B. Frazier Co. v. Long Beach Twp. 77 F. 2d 764, 765 (3rd Cir. 1935), this court, by application of the Rooker principle, reached substantially the same result that we by resort to the doctrine of res judicata reach here. Other courts have also taken the Rooker approach. [Citation ommitted]" (Emphasis in original) (484 F. 2d at 99, fn. 11).

Plaintiffs in the instant case request relief similar to that denied in Tang, Anderson and Roy. This Court, like the courts in those cases, is without jurisdiction to entertain their claim.

POINT IV

AS PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE INSUBSTANTIAL, A THREE-JUDGE COURT NEED NOT BE CONVENED.

As was seen above, defendants contend that plaintiffs have failed to state a cognizable § 1983 claim.

Even if this Court were to find, however, that plaintiffs have in fact alleged facts sufficient for them to challenge CPLR 1102(a) as applied to indigent matrimonial litigants, plaintiffs would succeed only if this Court were ultimately to find that they have a constitutional right to counsel. Defendants contend that they have no such right, that their constitutional challenge to CPLR 1102(a) is thus "obviously without merit," and that a three-judge court therefore need not be convened. Goosby v. Osser, 409 U.S. 512, 518 (1973).

Nowhere do plaintiffs allege that the right of indigent matrimonial plaintiffs to counsel has already been recognized, and, as was noted in Menin, supra, 79 Misc. 2d at 286-7:

> In pre-Boddie cases, the Supreme Court had refused to announce a right to counsel in civil matters (Hackin v. Arizona, 389 U.S. 143; Sandoval v. Rattikin, 385 U.S. 901; see Note, 76 Yale L.J. 545; Comment, 66 Columbia L. Rev. 1322). In two post-Boddie matters involving denial of assignment of counsel, the Supreme Court denied certiorari (Meltzer v. LeCraw & Co., 402 U.S. 954; Kaufman v. Carter, 402 U.S. 964)....
>
> An overwhelming majority of jurisdictions that have considered the issue of right to counsel in civil cases have held that no constitutional right attached hereto (Securities & Exch. Comm. v. Alan F. Hughes, Inc., 481 F. 2d 401, cert. den. 414 U.S. 1092; Peterson v. Nadler, 452 F. 2d 754; Matter of Robinson v. Kaufman, 8 Cal. App. 3d 783, cert. den. sub nom. Kaufman v. Carter, 402 U.S. 954; Archuleta v. Grand Lodge of Int. Assn. of Machinists & Aerospace Workers, 262 Cal. App. 2d 202; Powell v. State, 19 Ariz. App. 377; Matter of Waite, 143 Mont. 321; cf. Dade County v. McCrary, 260 So. 2d 543 [Fla.]; Caron v. Betit, 131 Vt. 53; Peace v. Peace, 288 N.E. 2d 602 [Mass.]).

Plaintiffs in Menin, like plaintiffs herein and plaintiffs in prior New York cases, sought to extrapolate a constitutional right to counsel from Boddie. The court rejected their contention, holding that

> Boddie is an access case lacking equal protection implications and it is concluded that since all indigent civil litigants are accorded access to the courts in this State, there is no denial of equal protection in refusing to assign court-appointed counsel (cf. Ross v. Moffitt, 417 U.S. 600). (id. at 287)

Defendants contend that, on this point, the court in Menin was correct; indeed, the Court of Appeals unequivocally came to the same conclusion in Smiley:

> On no view of the matter is counsel required in a matrimonial action as a condition to access to the court. Of course, counsel is always desirable, and in complicated matrimonial litigation would be essential. But however desirable or necessary, representation by counsel is not a legal condition to access to the courts (see, generally, Note, A First Amendment Right of Access to the Courts for Indigents, 82 Yale LJ 1055, 1066-1067). Access to the courts was the only problem to which the Boddie and Deason cases were addressed. (37 N.Y. 2d at 440)

See also United States v. Kras, 409 U.S. 434, 443 (1973):

> "Boddie was based on the notion that a State cannot deny access, simply because of one's poverty, to a 'judicial proceding [that is] the only effective means of resolving the dispute at hand.'"

Plaintiffs herein have apparently acknowledged that they cannot rely solely on Boddie; indeed, nowhere do they argue they have been denied access to the courts.

Rather, their argument is in large part based on the due process requirement of "fundamental fairness" enunciated in Justice Powell's concurrence in Argersinger v. Hamlin, 407 U.S. 25 (1972).

First, it should be noted that Justice Powell spoke of the "fundamental fairness doctrine" solely in the context of criminal proceedings:

> "I would adhere to the principle of due process that requires fundamental fairness in criminal trials...." (id. at 47)

Further, a full reading of this concurrence supports, not plaintiffs' contentions, but defendants', for Justice Powell disagreed strongly with the majority's holding that all defendants in criminal prosecutions in which imprisonment may result had a constitutional right to counsel:

> If I were satisfied that the guarantee of due process required the assistance of counsel in every case in which a jail sentence is imposed or that the only workable method of insuring justice is to adopt the majority's rule, I would not hesitate to join the court's opinion...." (id. at 62)

Justice Powell's view of the requirements of the fundamental fairness doctrine is significant; although plaintiffs wish to rely on it as mandating a right to counsel for all indigent matrimonial litigants, Justice Powell specifically rejected the argument that it required a blanket pronouncement of the right to counsel, even

for any class of criminal litigant, descrying such "mechanistic applications" or "inflexible rules," applying to "all cases within their defined areas regardless of circumstances:"

> "Due process...embodies principles of fairness rather than immutable line drawing....While counsel is often essential to a fair trial, this is by no means a universal fact...." (id. at 49)

The majority's "inflexible rule," he felt, was both constitutionally unnecessary and, if eventually extended to guarantee counsel for all criminal defendants, regardless of circumstances, complexity of the issues, or possibility of fine or jail sentence, potentially disastrous in its impact on "the administration of justice," producing an "extraordinary demand for counsel" (id. at 56), a "serious potential impact on already overburdened local courts" (id. at 58), and greatly increased costs to the public (id. at 59).

Further, such a rule would "favor defendants classified as indigents over those not so classified, yet who are in low-income groups where engaging counsel in a

minor petty-offense case would be a luxury the family could not afford." (id. at 50)

Justice Powell offered, as a constitutionally permissible, and far preferable alternative, a case-by-case analysis, considering the complexity of the offense charged, the probable sentence, and such individual factors as the defendant's competence to present his own case (id. at 64).

Such an analysis was deemed constitutionally sufficient to meet due process requirements for counsel in parole and probation revocation proceedings in Gagnon v. Scarpelli, 411 U.S. 778 (1972), on which plaintiffs therefore mistakenly rely.

The lower court in Gagnon had found an unconditional constitutional right to counsel in these proceedings. The Supreme Court disagreed:

> . . .we think that the Court of Appeals erred in accepting respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases. While such a rule

> has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel (411 U.S. at 787).

It found that "due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed," (id. at 788) and therefore mandated a case-by-case approach:

> We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness -- the touchstone of due process -- will require that the State provide at its expense counsel for indigent probationers or parolees. (id. at 790)

The case-by-case approach deemed constitutionally sufficient both in Gagnon and in Justice Powell's Argersinger concurrence is exactly what CPLR 1102(a) requires. Pursuant to this statute, a judge's decision to assign counsel to an indigent divorce plaintiff is to be based on an examination of such factors as the plaintiff's ability to speak English and competency to comprehend the legal procedures which must be followed, the complexity of the issues the plaintiff presents, and the availability and sufficiency of help by paraprofessionals and court personnel.

Defendants believe it inconceivable that a federal court, relying on the fundamental fairness doctrine as applied in Gagnon and Justice Powell's Argersinger concurrence, could find this procedure insufficient to guarantee indigent divorce plaintiffs due process.

Further, these two decisions require a federal court to consider the "costs and collateral disadvantages" of a broad guarantee of counsel to all indigent divorce plaintiffs, regardless of their circumstances. If such a guarantee were to be given, the demand for counsel would increase significantly, the impact on already over-burdened

local courts would be extraordinary, and the resultant cost to taxpayers would be immense. Such costs and collateral disadvantages are clearly not justified, in light of the fact that a constitutionally - permissible, more workable method of insuring justice -- CPLR 1102(a) -- already exists.

Likewise, arguments under the Equal Protection Clause are unavailing.

Case under the Equal Protection Clause have long recognized that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1939).

The test to be applied to the difference is solely proof of "some rationality":

> "To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons [citing Tigner]. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are

> drawn have "some relevance to the purpose for which the classification is made." Rinaldi v. Yeager, 384 U.S. 305, 309 (1965).

What is to be avoided is "invidious discrimination". Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1954).

As was noted in Douglas v. California, 372 U.S. 353 (1962):

> "... it is appropriate to observe that a state can, consistently with the Fourteenth Amendment provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination' [citing Williamson]."

The "rational relationship" test applies to classifications adversely affecting indigents unless a "fundamental interest" is involved.

A fundamental interest is one which is constitutionally recognized. As has been seen above, the right of indigent divorce litigants to counsel is not so recognized. Thus, while this right is related to their fundamental right of access to the courts enunicated in Boddie, it is not itself fundamental for purposes of the compelling interest test.

In Griffin v. Illinois, 351 U.S. 23 (1956), the Supreme Court enunicated the right of all indigents to copies of those portions of their transcripts necessary for appeal. However, the Court refused to hold that Illinois "must purchase a stenographer's transcript in every case where a defendant cannot buy it," (351 U.S. at 20), a refusal solidly grounded in the doctrine, cited above, that a State need not guarantee absolute equality between rich and poor defendants in all phases of the judicial process. As Mr. Justice Frankfurter noted in his concurrence in Griffin:

> "Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." (at 23).

The case therefore has, like Boddie, been viewed as an "access" case, standing only for the proposition that access to an instrument necessary to vindicate legal rights cannot be denied:

> "But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force

> of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." (Ibid.)
> (Emphasis added.)

Griffin's progeny, in making clear that even the denial of a transcript will only be of constitutional dimension if the transcript in question was "necessary to vindicate legal rights," Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (per curiam), reveal the frivolity of plaintiffs' equal protection claim, in that they show that a right enunciated for "access" purposes may not be relied upon when access has not in fact been denied.

In United States v. Carella, 411 F. 2d 729 (2d Cir., 1969), cert. den. sub. nom. Erhart v. United States, 396 U.S. 860, denial of a free transcript of a former trial was also held not to have violated plaintiff's rights:

> "The Court's objective has not been to place the poor defendant on a basis of perfect equality with the rich one, which is manifestly impossible, see Griffin v. Illinois, 351 U.S. at 23, 76 S. Ct. at 592 (concurring opinion of Mr. Justice Frankfurter), but rather, as stated in Roberts v. LaVallee, supra, 389 U.S. at 42, 88 S. Ct. at 196, to

> outlaw differences, based on the financial situation of the defendant, "in access to the instruments needed to vindicate legal rights." We are unwilling to say that a full transcript of a lengthy former trial, much of it relating to matters of no true concern to the indigent defendant, is invariably "needed," however convenient it might be ...."

See also: Britt v. North Carolina, 404 U.S. 226 (1971) (transcript of trial resulting in hung jury held unnecessary in circumstances of case); United States v. Bueno, 470 F. 2d 154 (5th Cir., 1972) (denial of transcript of mistrial); Reinoehl v. Hershey, 426 F. 2d 815 (9th Cir., 1970) (Selective Service regulation upheld which imposed costs on transcription of registrant's file prior to, but not subsequent to indictment or habeas corpus proceedings); Leslie v. Matzkin, 450 F. 2d 319 (2d Cir. 1971), cert. den. 406 U.S. 932 (1972) (transcripts of probable cause hearings held not needed to vindicate plaintiff's legal rights); United States ex rel. Cadogan v. LaVallee, 428 F. 2d 165, 167 (2d Cir., 1970), cert. den. 401 U.S. 914, (denial of transcript of pre-trial suppression hearing held non-prejudicial); Gardner v. United States, 407 F. 2d 1266 (D.C. Cir., 1969), cert. den. 395 U.S. 911 (1969) and Boney v. United States, 387 F. 2d 237 (D.C. Cir.,1967),

cert. den. 390 U.S. 967 (1968) (denial of transcripts of preliminary hearings) and Nash v. Reincke, 325 F. 2d 310, 312 (2d Cir., 1963), cert. denied 377 U.S. 938 (1964) (transcript of hearing regarding request for appointment of special public defender and claim of misconduct by prison officials was "in no way essential to meaningful appeal of conviction."

In all of these cases, the transcripts sought would clearly have aided plaintiffs, and presumably would have been purchased, had plaintiffs had the funds to do so; nonetheless, the courts held that this disadvantage, resulting solely from indigence, was not of sufficient magnitude to constitute a violation of plaintiffs' Fourteenth Amendment rights.

Plaintiffs do not argue that the denial of counsel to some indigent divorce litigants denies them access to the courts. Therefore, the distinction between indigent divorce litigants, indigent Family Court litigants, and non-indigent divorce litigants will be sustained if it has a rational purpose. Clearly, both fiscal considerations and a desire to avoid those adverse effects on the "administration of justice" warned of by Justice Powell are rational, within the meaning of the Equal Protection test.

Plaintiffs therefore having raised constitutional claims which, even if cognizable by this Court, are "obviously without merit," a three-judge court should not be convened.

POINT V

A CLASS SHOULD NOT BE CERTIFIED HEREIN.

1. Plaintiffs have standing only to represent persons similarly situated to them.

Although plaintiffs seek to represent a class consisting of all indigent divorce litigants in Bronx County, certification of such a class would violate the fundamental principle of constitutional law that clallenges to state statutes may be brought only by persons actually aggrieved by the operation of these statutes. Thus, when a statute, constitutional on its fact, is alleged to be applied in an unconstitutional manner, the plaintiffs must be persons against whom the statute was actually applied in the unconstitutional manner complained of.

Plaintiffs' grievance against CPLR 1102(a), if cognizable at all, must therefore be based on the actual application of the statute to these plaintiffs, and consequently must be limited to the interpretation of this statute made by Justice Cotton in Matter of Boyd.* His interpretation, that CPLR 1102(a) permits him to deny counsel to indigent matrimonial plaintiffs in need of counsel on the ground that, absent compensation for such assignments, the resources of the private Bar are inadequate to meet their needs for counsel, thus defines what would be the proper scope of plaintiffs' challenge to this statute. The question of the constitutionality of CPLR 1102(a) as applied to indigent matrimonial litigants denied assigned counsel in

*The first ten named plaintiffs were denied assigned counsel in Matter of Boyd. Two of the remaining plaintiffs -- Stella Palmer and Valeria Harding -- never applied for assigned counsel pursuant to CPLR 1102(a), and therefore have not been actually aggrieved by operation of that statute. The thirteenth plaintiff, Carlota Barrera, although denied assigned counsel, had a right to payment of counsel fees by her husband, plaintiff in a divorce action against her and represented by private counsel, pursuant to DRL § 237. Plaintiff Barrera does not allege, however, that she sought and was denied counsel fees pursuant to DRL § 237.
Defendants therefore argue that, even if the complaint is otherwise sufficient, these three plaintiffs are improperly before this Court.

other situations, i.e. upon findings that they either were not in need of counsel, or were in need of counsel but counsel could not be assigned for reasons other than those given by Justice Cotton, may not be raised by plaintiffs herein.

In Barrows v. Jackson, 346 U.S. 249, 256-7 (1952), the Supreme Court "reaffirmed" the "salutory rule" that "one may not claim standing in this Court to litigate the constitutional rights of some third party."

It explained the rationale behind this rule as follows:

> The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to "cases" and "controversies." See Coleman v. Miller, 307 U.S. 433, 464 (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 (concurring opinion). The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.

> There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed. Bode v. Barrett, 344 U.S. 583, 585; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160-161; see also Tennessee Elec. Power Co v. Tennesseee Valley Authority, 306 U.S. 118, 144. One reason for this ruling is that the state court, when actually faced with the question, might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provisions separable. New York ex rel. Hatch v. Reardon, supra, at 160-161; Wuchter v. Pizzutti, 276 U.S. 13, 26-28 (dissenting opinion). It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that of the state legislatures. Cf. Southern Pacific Co. v. Gallagher, 306 U.S. 167, 172.

The Supreme Court later relied upon this rule in Bailey v. Patterson, 369 U.S. 31, 32-3 (1961):

> "Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot represent a class of whom they are not a part."

See also North Carolina v. Rice, 404 U.S. 244 (1971); Golden v. Zwickler, 394 U.S. 103 (1969); Palmer v. Thompson, 391 F. 2d 324, 327 (5th Cir. 1967) aff'd 403 U.S. 217 (1971); Thaxton v. Vaughan, 321 F. 2d 474 (4th Cir. 1963); Mendez v. Heller, supra, at 22 ; McDonald v. Lucas, 371 F. Supp. 831, 833 (S.D.N.Y. 1974) (3-judge court), aff'd. 419 U.S. 987 (1975), quoted infra. at65-6; Pollard v. United States, 384 F. Supp. 304, 311 (M.D. Ala, N.D. 1974); Smiley v. City of Montgomery,305 F. Supp. 451, 453 (M.D. Ala. N.D. 1972); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968) aff'd. 393 U.S. 266 (1968).

These cases make clear that if plaintiffs herein may in fact challenge CPLR 1102(a), they may challenge that statute only insofar as it has been applied to them; they may not make claims on behalf of, or challenge the constitutionality of CPLR 1102(a) as it may be applied to indigent matrimonial litigants not similarly situated to them. Even if CPLR 1102(a) does authorize judges to deny counsel to all indigent matrimonial defendants, and to all indigent matrimonial plaintiffs

not found to be in need of counsel, and even if it further authorizes judges to deny counsel to indigent matrimonial plaintiffs found to be in need of counsel on grounds other than those relied upon by Justice Cotton in Matter of Boyd, the constitutional claims of persons denied assigned counsel by these applications of CPLR 1102(a) may not be raised by plaintiffs herein.

2. Certification of a class consisting of the 61 plaintiffs in Matter of Boyd is not warranted, if the complaint is not dismissed.

Plaintiffs make no allegations showing the existence of persons (other than the remaining 51 plaintiffs in Boyd) similarly situated to them -- i.e., other indigent divorce plaintiffs who have sought assigned counsel under CPLR 1102(a), who have been found to need such counsel, and who have been denied counsel on Justice Cotton's grounds. Nor do they allege facts showing that Justice Cotton himself, or any other justice authorized to assign counsel pursuant to CPLR 1102(a), has engaged in a pattern or practice of declining to assign counsel to indigent divorce plaintiffs needing such counsel on the ground that absent compensation for such assignments the resources of the private Bar are inadequate to meet the need of the plaintiffs for counsel.

The proper plaintiffs, therefore, would at most be those persons affected by the decision in Matter of Boyd, the 61 plaintiffs therein.

However, certification of a class consisting of the 61 plaintiffs in Boyd is unwarranted, both because plaintiffs would have little chance of success on the merits of their constitutional claim, and because a judgment in plaintiffs' favor for declaratory and injunctive relief, however unlikely, would automatically run to the benefit, not only of the named plaintiffs, but of all persons similarly situated.

Class certification has been consistently denied in this Circuit where a judgment of unconstitutionality would run to the benefit, not only of the named plaintiffs, but of all others similarly situated. In the leading case of Galvan v. Levine, 490 F. 2d 1255 (2d Cir. 1973), cert. denied 376 U.S. 910, plaintiffs appealed the district court's denial of their motion for class certification. The Circuit Court, Friendly, J., in affirming, stated at 1261:

> "...an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or

> administrative practice is the archtype of one where class action designation is largely a formality, at least for the plaintiffs. As we have recently noted in Vulcan Society v. Civil Service Comm'n., 490 F. 2d, 399 (1973) what is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the judgment run to the benefit not only of the named plaintiffs but of all others similarly situated. See Bailey v. Patterson, 323 F. 2d 201, 206-207 (5th Cir. 1963) cert. denied, 376 U.S. 910, 84 S. Ct. 666, 11 L. Ed. 2d 609 (1964); Cf. United States v. Hall, 472 F. 2d 261, 266 (5th Cir. 1972), as the judgment did here."

See also: Glodgett v. Betit, 368 F. Supp. 211 (1973, aff'd. sub. nom. Philbrook v. Glodgett, 419 U.S. 963 (1975); McDonald v. McLucas, 371 F. Supp. 831 (S.D.N.Y. 1974) (3 judge court), aff'd. 419 U.S. 987 (1975) (mem. op.).

In Bailey v. Patterson, 323 F. 2d 201, 206 (5th Cir. 1963), cert. denied 376 U.S. 910 (1964) the court explained the effect and application of the decree in a segregation case as follows:

> "Appellants do not seek to use those parts of segregated facilities that have been set aside for use by 'whites only.' They seek the right to use facilities which have been desegregated, that is, which are open to all persons, appellants and others, without

> regard to race. The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated."

Further, the Court of Appeals, Friendly, Circuit Judge, made the following remarks as to the need for class certification in Vulcan Society v. Civil Service Commission, 490 F. 2d 387, 399 (2d Cir. 1973);

> "He [the District Judge] was entirely right in thinking it unnecessary, from the plaintiff's standpoint, for him to decide on class action designation in order to pass upon the issues raised in regard to Exam 0159. If the examination procedures were found unconstitutional as regards the named plaintiffs, they were equally so as regards all eligible blacks and Hispanics, and it would be unthinkable that the municipal defendants would insist on other actions being brought."

In McDonald v. McLucas, supra, the next of kin of American servicemen in Indochina, carried in a missing status, sought a declaratory judgment declaring unconstitutional the procedure to determine whether to make official reports of death of persons missing. The Court said:

> "The threshold issue which we must resolve is whether this suit may be maintained as a class action....the class would include members whose missing status was changed by a

determination of death made anytime since January, 1962."

"First, none of the named plaintiffs are proper representatives of the group of military personnel who have previously been declared dead under Section 555 and 556. They could only represent those 'designated next-of-kin' of members who are still missing.

As far as the remainder of the purported class is concerned, the issue of the unconstitutionality of these statutes can be raised and determined in an action for a declaratory judgment and injunctive relief without the necessity of a class action. A class action here would be largely a formality... A favorable judgment here would obviously accomplish this result. The Court can properly assume that an agency of the government would not persist in taking actions which violate the rights of a service member's next of kin, if the statutes are declared unconstitutional. [Citing cases]." (371 F. Supp. at 833-4).

And in Koehler v. Ogilvie, 53 F.R.D. 98, 101 (N.D. Ill. 1971), affd. 405 U.S. 906 (1972) (mem. op.), the District Court concluded:

"Finally a class action is unnecessary to enable an appropriate examination of the constitutionality of the Illinois divorce laws since it can as effectively be achieved in an individual or joint action as in a class action."

In the case at bar, plaintiffs constitutional claim could result, at best, in a judgment declaring CPLR 1102(a) unconstitutional as applied to indigent divorce plaintiffs found to be in need of counsel yet denied assigned counsel on the ground that, in light of the fact that attorneys so assigned could not be compensated, the resources of the private bar were inadequate to meet the plaintiffs' need for counsel. Such a judgment would obviously run, not only to the benefit of the named plaintiffs, but to the benefit of all similarly situated indigent divorce plaintiffs. Class certification, under the cases cited above, is therefore clearly unwarranted.

3. On no view of the complaint is certification of the class sought by plaintiffs warranted.

Plaintiffs seek to represent a class consisting of "all indigent persons who are or will be plaintiffs or defendants in divorce actions brought in the Supreme Court of the State of New York, Bronx, County, and who are unable to obtain counsel". Complaint, par. 9.

Such a description of the class plaintiffs seek to represent is predicated on plaintiffs' desire to challenge CPLR 1102(a) insofar as it allegedly acts to deprive any

indigent divorce litigant -- plaintiff or defendant -- of appointed counsel, on any ground and irregardless of the individual's actual need for counsel. As was seen in Point 1, however, plaintiffs challenge to CPLR 1102(a), if cognizable at all, is limited to a challenge of that statute insofar as it has allegedly deprived them, indigent divorce plaintiffs found to be in need of counsel, of the right to counsel on the ground that, in light of the fact that attorneys so assigned may not be compensated, the resources of the private bar are inadequate to meet their need for counsel.

Certification of this large class is therefore clearly unwarranted, both because the named plaintiffs are not representative of this class they seek to represent, and because they cannot raise the constitutional claims they seek to raise on behalf of these persons.

Further, even if the declaratory relief plaintiffs seek somehow were to be granted, this relief would automatically inure to the benefit of the purported class, thereby making class certification unnecessary under the cases discussed at pages 63-66 , supra.

CONCLUSION

FOR THE REASONS CITED ABOVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
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Respectfully submitted,

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